Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

ON THE HOUSE SYNDICATION, INC., and CAREY BROTHERS, INC., on behalf of themselves and all others similarly situated,

Petitioners,

v.

FEDERAL EXPRESS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit erred, in following five other circuits that are in conflict with the Sixth and Seventh Circuits, by applying principles of federal common law to exercise subject matter jurisdiction over a contract claim against an interstate air cargo carrier following the enactment of the Airline Deregulation Act, 49 U.S.C. § 40120, and this Court's decision in *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995).

2. Whether, contrary to the teachings of *Wolens*, the Ninth Circuit erred in refusing to apply core contract doctrines, such as *contra proferentum* and futility, in construing and enforcing an air carrier contract.

PARTIES TO THE PROCEEDINGS BELOW

On the House Syndication, Inc. and Carey Brothers, Inc., were the plaintiffs, appellants, and cross-appellees below. Federal Express Corporation was the defendant, appellee, and cross-appellant below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Petitioners On the House Syndication, Inc., and Carey Brothers, Inc., state the following:

Petitioners are both privately owned corporations. Neither is owned, in whole or in part, by a parent company or by a public company.

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PETITION FOR A WRIT OF CERTIORARI

On the House Syndication, Inc. and Carey Brothers, Inc., on their own behalf and on behalf of all others similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

PRELIMINARY STATEMENT

This case concerns an unprecedented expansion of federal jurisdiction over state law contract claims involving interstate air carriers subject to the Airline Deregulation Act of 1978, 49 U.S.C. § 41713 *et seq.* (the "ADA"). Prior to 1978, the federal government regulated interstate airfares and the terms and conditions of the air carriage of goods. Congress enacted the ADA to deregulate the domestic airline industry and allow competition and market forces to determine industry practices. To prevent local interference with these goals, Congress preempted the states from enacting or enforcing laws related to airline prices, routes, or services. Congress preserved, however, all existing legal remedies that did not threaten the goals of deregulation under the ADA.

This Court has recently explored the reach of the ADA's preemption and savings clauses, but that decision has spawned enormous confusion among eight different circuits. In *American Airlines v. Wolens*, 513 U.S. 219 (1995), this Court explained that the ADA's preemption clause prohibits states "from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id.* at 232-33. Accordingly, this Court held that the ADA does not preempt state law contract claims that do not allege any violation of a state-imposed law, rule, regulation, or standard. *Id.* at 233.

Notwithstanding that clear direction in *Wolens*, the Ninth Circuit below exercised jurisdiction over a routine breach-of-contract dispute that arose solely from the obligations expressed in the parties' agreement. The Ninth Circuit's assumption that the ADA permits federal question jurisdiction over air carrier contract disputes transforms the limited role of federal common law in this field envisioned by Congress, and cannot be squared with this Court's consistent interpretations of the ADA. Significantly, the Ninth Circuit's erroneous decision builds upon erroneous decisions of the Second, Third, Fourth, Fifth, and Eighth Circuits, and conflicts with holdings of the Sixth and Seventh Circuits. These divergent judgments necessitate this Court's guidance on whether federal common law governs routine breach-of-contract claims, and the extent to which the ADA preempts generally recognized doctrines of state contract law. Given the widespread and mature conflict among the circuit courts on these issues, this Court's review is warranted.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 12a-13a) is not reported. The opinion of the district court (Pet. App. 12a-13a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 2003. On December 23, 2003, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including January 28, 2004. Pet. App. 51a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent sections of the Airline Deregulation Act are reproduced at Pet. App. 42a.

STATEMENT OF THE CASE

1. Federal Express ("FedEx") is the world's largest express delivery service and is certified by the Federal Aviation Administration as an all-cargo air carrier. FedEx offers customers six different tiers of shipping services that promise delivery by specified dates and times. Pet. App. 56a-58a. Under this system, FedEx customers are able to request in advance whether their package will arrive at its destination within a few days, overnight, or before 10:30 a.m. on the following business day. Pet. App. 56a - 58a. Costs for each tier of service correlate to the delivery priority requested by the customer, with higher charges for expedited deliveries. Pet. App. 111a.

Each FedEx shipment is arranged using an order form known as a FedEx USA Airbill ("Airbill") that explains the basic terms and costs of the delivery services. Pet. App. 85a - 86a. The Airbill incorporates by reference the FedEx Service Guide ("Service Guide"), a more than 120 page document containing additional terms governing the delivery services. Together, the Airbill and the Service Guide formed the contract between the parties at issue in this case.

Both the Airbill and the Service Guide undisputedly promised a full refund for any service failures outside certain disclaimers and exceptions. Pet. App. 255a *et seq*. Thus, if FedEx failed to deliver a priority package by 10:30 a.m. the next day as requested, FedEx would be contractually obligated to offer the customer a refund. The FedEx Service Guide also clearly stated that the terms in the Service Guide—including the money- back guarantee—could only be amended by the written authorization of FedEx's Senior Vice President of Marketing and Corporate Communications. Pet. App. 209a.

The United Parcel Service ("UPS") is a cargo delivery service and FedEx's main competitor in the express shipping business. In August 1997, UPS employees went on strike. As a result of the UPS strike, FedEx recorded a significant increase in shipping volume. This record volume, however, proved too great for FedEx's distribution network and resulted in over nine million service failures on customer contracts during the UPS strike.

FedEx anticipated that it would be unable to absorb the many UPS customers who would flock to it during the UPS strike, so it sought obliquely to avoid its contractual obligations while profiting as much as possible. On July 31, 1997, FedEx issued a press release stating that "[a]s provided in our Service Guide and until further notice, we will not offer money-back guarantees." Pet. App. 47a - 48a. The substance of that press release was reported in only one newspaper on August 1, 1997, the day after it was "released." Further, FedEx delayed communicating that position electronically to its customers until August 6, 1997. The record also confirms that FedEx's Senior Vice President of Worldwide Marketing did not regard the press release as a revision or change to the Service Guide, as required for a valid amendment. Subsequently, on August 8, 1997, FedEx issued an amendment to the Service Guide (the "Amendment") providing that the money-back guarantee was suspended until further notice, and purporting to make the Amendment retroactive to July 31, 1997. Pet. App. 49a - 50a.

These after-the-fact alterations to the Service Guide allowed FedEx to avoid the refunds triggered by its late deliveries. Throughout the UPS strike, FedEx refused to honor the money-back guarantee set forth in the Service Guide. When customers called to request a refund for a late delivery, a FedEx recording advised them as follows:

> Thank you for calling FedEx Customer Account Services. Due to the recent service disruption at UPS, we have temporarily suspended our money-back guarantee on shipments tendered from July 31st until August 23rd. No refunds, credits or service downgrades can be permitted during this time frame.

As a result of the UPS strike, FedEx obtained approximately $150 million dollars in incremental revenues. Consequently, FedEx posted a record profit for the normally slow summer quarter. That profit, though, came at the expense of its customers, who were required to pay for services they did not receive, and who were deprived of the benefits of FedEx's guarantee at a time when it was still a contractually binding obligation.

2. Petitioners, On the House Syndication, Inc. and Carey Brothers, Inc., originally filed this action in the Superior Court of San Diego County, California. FedEx then timely removed the action to the district court for the Southern District of California solely on the basis that the claims arose under federal common law. Pet. App. 39a - 41a. FedEx's removal was predicated on established Ninth Circuit precedent holding that breach-of-contract claims involving an air carrier's duties are governed by federal common law, so Petitioners did not move to remand. Petitioners then filed an amended complaint asserting two contract claims: first, that FedEx breached its delivery contract by charging Petitioners, and similarly situated persons, for expedited deliveries that it failed to perform (the "Excess Charges Claim"); and, second, that FedEx breached its delivery contract by refusing to honor the money-back guaranty contained in the Service Guide for service failures occurring between July 31, 1997 and August 8, 1997 (when it actually amended the terms of the Service

Guide) (the "Money-Back Guarantee Claim"). Petitioners included no additional causes of action or grounds for relief.

3. Both parties then moved for summary judgment on Petitioners' contract claims. On April 6, 2000, the district court granted and denied each of the summary judgment motions in part, finding in favor of Petitioners on the Money-Back Guarantee Claim, and in favor of FedEx on the Excess Charges Claim. The district court first considered whether Petitioners' claims were preempted by the ADA. Relying on this Court's decision in *Wolens* and the Ninth Circuit's decision in *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190 (9th Cir. 1999), the district court concluded that Petitioners' "routine" "claim for breach of contract" turned exclusively on the terms of the parties' agreement with "no need to analyze . . . common law rights and policies" to resolve the parties' dispute. Pet. App. 28a. The district court did not, however, consider whether that conclusion eliminated the basis for federal question jurisdiction invoked by FedEx.

Then, on June 28, 2000, the district court denied FedEx's motion for reconsideration holding, *inter alia*, that the contract's *force majeure* provision was irrelevant in the context of the "third-party strike of UPS in this case" and expressly finding that Petitioners were excused from making a claim to FedEx prior to bringing suit because any such claim "would have been futile." Pet. App. 36a.

After discovery and further proceedings, the district court certified a class consisting of persons suffering service failures during the period between July 31, 1997 and August 7, 1997. Notice of the pending class was then mailed to approximately 400,000 class members in November 2001. On June 17, 2002, the district court entered final judgment.

4. On appeal, the Ninth Circuit reversed in part and affirmed in part. The panel issued three separate opinions: an unsigned opinion of the court, a concurrence in part accompanied by a concurrence in the result, and a dissent.

The panel majority opinion expressly confined its analysis to the "import of the language" in the Amendment and the Service Guide. Pet. App. 4a. Interpreting the parties' contract, the majority opinion reversed the grant of summary judgment in favor of Petitioners on the Money-Back Guaranty Claim and awarded summary judgment in favor of FedEx. The majority opinion reasoned that customers who contracted with FedEx during the class period "were, or should have been, aware of FedEx's interpretation of its Service Guide" as stated in the press release. Pet. App. 4a. The majority opinion conceded, *sub silentio*, that the press release could not properly amend the Service Guide, but, relying solely on the Restatement (Second) of Contracts § 201, held that "the contract term shall be interpreted according to the meaning attached by" FedEx. Pet. App. 5a The majority explained that, because FedEx did not know that customers interpreted the press release to retain the money-back promise, "the contract term shall be interpreted according to the meaning attached by" FedEx. *Id.*

The majority also affirmed the grant of summary judgment in favor of FedEx on the Excess Charges Claim, construing the Service Guide to require the Petitioners to make a claim to FedEx before filing suit. Pet. App. 5a-6a. The majority simply ignored the district court's express finding that Petitioners were excused from making such a claim because it would have been futile given FedEx's unequivocal position that it would not honor the Guarantee, and instead relied on cases holding that the ADA preempted the application of contract doctrines such as futility.

In partial concurrence, Judge Silverman agreed with the result reached by the majority, but offered a different interpretation of the agreement. Unlike the majority opinion, Judge Silverman read the language of the Service Guide to allow the July 31, 1997 press release issued by FedEx to amend the parties' contract, and thereby preclude Petitioners' Money-Back Claim. Pet. App. 7a-8a. Like the majority opinion, Judge Silverman's opinion also rested entirely on the terms of the parties' bargain, as he deemed it modified by the press release.

Judge Rawlinson dissented. She rejected the majority opinion's reliance on the Restatement of Contracts, and instead interpreted the Service Guide to preclude the suspension of the money-back guarantee contemplated in the July 31, 1997 press release. Pet. App. 10a. Additionally, Judge Rawlinson disputed the interpretation of the notice provision offered by the majority and concurring opinions. Pet. App. 11a.

REASONS FOR GRANTING THE PETITION

By permitting the exercise of jurisdiction in federal court of purely state-law contract disputes, the Ninth Circuit gravely misapplied this Court's precedents on an issue that has divided eight different circuits. The court adjudicated a routine breach-of-contract claim "pursuant to judicially fashioned federal common law" in clear contradiction of this Court's holding in *Wolens*. 513 U.S. at 232. The Ninth Circuit's invocation of federal jurisdiction was an unwarranted expansion of the ADA that risks channeling "the range of contract claims relating to airline rates, routes, or services" into the federal courts. *Id.*

The panel's per curium majority *sub silentio* applied settled Ninth Circuit precedent to achieve that result. Despite this Court's decision in *Wolens*, eight circuit courts and

numerous district courts have considered whether federal law governs contract claims against air carriers, with the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits holding that contract claims against air carriers are governed by federal common law that preempts state claims, and the Sixth and Seventh Circuits requiring breach-of-contract claims to be brought against air carriers in state court. The conflict among these circuit decisions is thus long-standing and mature, presenting a compelling justification for this Court's immediate review.

In addition, four circuit courts and a host of district courts have considered whether the ADA preempts ancillary state law contract doctrines that are important in the construction of air carrier contracts. Claims or defenses based on core contract principles such as fraudulent inducement, estoppel, and waiver arise in nearly every contract case, and dictated the outcome in this matter. Given the tremendous volume of contract disputes involving air carriers in both federal and state courts, the tensions over the use of specific contract doctrines are certain to increase as demonstrated by *United Airlines v. Mesa Airlines*, 219 F.3d 605 (7th Cir. 2000), *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002), and the Ninth Circuit's decision below.

This Court's guidance is needed on these important questions. Notwithstanding the court's *per curiam* treatments, the Ninth Circuit position on both questions is now so well-settled that this Court will likely not get another opportunity to review the Ninth Circuit's approach to these critical issues. Given the number of divergent circuit court decisions, the significant dollar value represented by private contracts with airlines, and the importance of the federalism concerns implicated by the ADA, this Court's review is warranted.

I. THERE IS A DEEP AND RECURRING CONFLICT OVER WHETHER FEDERAL COURTS HAVE JURISDICTION AFTER *WOLENS* TO ADJUDICATE BREACH OF CONTRACT CLAIMS AGAINST AIR CARRIERS

In *Wolens*, this Court made clear that Congress did not intend the ADA to "channel into federal courts the business of resolving, pursuant to judicially fashioned federal common law, the range of contract claims relating to airline rates, routes, or services." 513 U.S. at 232. Notwithstanding that unequivocal guidance, six circuit courts have held that federal common law governs routine breach-of-contract claims against air cargo carriers. Two circuit courts and several district courts have held to the contrary. A definitive answer on the scope and meaning of the ADA's preemption clause is thus required from this Court.

A. *Wolens* Holds That The ADA Does Not Preempt State Law Contract Claims

In 1978, Congress enacted the ADA, determining that "maximum reliance on competitive market forces" would best further growth, innovation, and price competition. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378 (1992) (quoting 49 U.S.C. §§ 1302(a)(4), (a)(9)). Congress sought to ensure that myriad state laws would not frustrate the goals of deregulation by including a preemption provision in the ADA "relating to rates, routes, or services" for air transportation. *Id.* at 378-79 (quoting 49 U.S.C. § 1305(a)(1)).

While the ADA preempted State regulation of air carriers, Congress did not similarly preempt state law claims arising solely from the airline's "privately ordered obligations." *Wolens*, 513 U.S. at 228. In *Wolens*, this Court considered whether the ADA's preemption clause barred a cause of

action arising from the alleged breach of an airline's frequent flyer program. The Court reaffirmed its interpretation of the ADA in *Morales* that Congress did not intend to allow the States to "hobble" federal deregulation through the passage of a patchwork of inconsistent laws. *Id.* at 228.

However, this Court distinguished "suits alleging a violation of state-imposed regulation" from claims "seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings." *Id.* This Court explained that the terms and conditions of services offered by an air carrier to its customers constituted a purely private obligation that posed no threat to Congress's deregulatory intent. *Id.* at 228-29. The ADA, this Court recognized, was enacted to promote reliance on the market for air services, and thus contemplated "effective means to enforce" the resulting private agreements. *Id.* at 230. Accordingly, the Court construed the ADA to preempt claims based on "what the State dictates" through its laws and regulations, but not what the airline undertakes to perform of its own accord. *Id.* at 232-33.

Applying these principles, *Wolens* held that the ADA does not preclude a state law contract claim where 1) the claim arises from the parties' bargain "with no enlargement or enhancement based on state laws or policies external to the agreement"; and 2) the remedy sought by the plaintiff is "confined to a contract's terms." *Id.* at 229, 233.

B. The Ninth Circuit's Decision Conflicts With *Wolens*

The Ninth Circuit mechanistically adhered to its earlier decision on the scope of federal common law preserved by the ADA in *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186

F.3d 1190 (9th Cir. 1999).[1] The court therefore did not follow this Court's instruction in *Wolens* that the ADA preempts state law claims that "enlarge or enhance" the contractual obligations voluntarily undertaken by air carriers, but "permits state-law-based adjudication of routine breach-of-contract claims." 513 U.S. at 232-33. The Ninth Circuit never questioned whether the claims asserted against FedEx satisfied the jurisdictional requirements outlined in *Wolens*. That error is crucial because absent applicable federal common law, the courts below lacked subject matter jurisdiction to decide this case.

In *Read-Rite*, the Ninth Circuit held that federal common law governed claims relating to "the carriage contract of an air carrier." *Id.* at 1195. The Ninth Circuit considered whether a limited-liability provision contained in an air cargo contract was enforceable. The court held that the "scope and standard of limited liability" provisions in an air carrier's contract "are directly related to the carrier's rates and services" and thus "go to the very heart of the ADA." *Id.* at 1198.

Because of the sweeping breadth of *Read-Rite*'s explanation, federal common law governs many ordinary breach-of-contract claims against air carriers in the Ninth Circuit. Accordingly, the Ninth Circuit did not resolve whether the claims asserted against FedEx would "enlarge" or "enhance" the services FedEx agreed to provide in its contract.

Rather, the majority opinion interpreted the parties' contract to find that customers who contracted with FedEx

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[1] The author of *Read-Rite*, Judge Fletcher, was the only member of the panel below not to write separately, preferring instead to join the court's *per curiam* opinion.

during the class period "were, or should have been, aware of FedEx's interpretation of its Service Guide," and were bound by that interpretation. Pet. App. 4a. This conclusion—and the supporting citation to the Restatement of Contracts—confirms that the Ninth Circuit implicitly held that adjudicating these questions required no examination of state substantive standards or policies external to the agreement, but rather was a matter of federal common law.

In accord with *Wolens*, Petitioners sought remedies that were within the four corners of the contract. Under their Money-Back Guarantee claim, Petitioners simply sought the benefit of the guarantee expressly provided for in the Service Guide. Similarly, under their Excess Charges claim, Petitioners sought merely to recover the incremental premium amounts that FedEx charged them above the contractually specified prices for the services they actually received. Thus, the remedies that Petitioners sought were limited to the terms of the contract with any damages flowing solely from the four corners of the parties' agreement.

The Ninth Circuit's decision to adjudicate the present case thus expands on *Read-Rite* and the court's earlier view that the ADA "intended to insulate the industry from state economic regulation" rather than "immunize" airlines for obligations of their private commitments. *See Charas v. Trans World Airlines, Inc.*, 160 F.3d 1259, 1266 (9th Cir. 1998) (*en banc*).

In conjunction with *Read-Rite*, the decision below demonstrates complete disregard for this Court's holding in *Wolens* that effective competition in a deregulated market mandates that airlines be held to the terms that they voluntarily undertake. In doing so, the decision below denied Petitioners any remedy for FedEx's breach of its own contract

while simultaneously expanding the scope of federal jurisdiction to encompass routine state law claims.

C. Eight Circuit Courts Are Deeply Divided Over How To Apply *Wolens* And The ADA To State Breach Of Contract Claims

1. Despite this Court's decision in *Wolens*, the Second, Third, Fourth, Fifth, Eighth, and Ninth Circuits have now held that federal common law governs breach-of-contract claims against air carriers. *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys., Inc.*, 235 F.3d 53 (2d Cir. 2000); *Read-Rite*, 186 F.3d at 1190; *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922 (5th Cir. 1997); *McCall-Thomas Eng'g Co., Inc. v. Federal Express Corp.*, 81 F.3d 28 (4th Cir. 1996); *Arkwright Boston Mfgs. Mut. Ins. Co. v. Great Western Airlines, Inc.*, 767 F.2d 425 (8th Cir. 1985); *First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc.*, 731 F.2d 1113 (3d Cir. 1984). In direct conflict, the Sixth and Seventh Circuits hold that the ADA accommodates state-law contract claims and thus precludes a federal cause of action. *Musson Theatrical, Inc. v. Federal Express Corp.*, 89 F.3d 1244 (6th Cir. 1996); *Travel All Over the World, Inc. v. Kingdom of Saudi Arabia*, 73 F.3d 1423 (7th Cir. 1996).

In the aftermath of *Wolens*, the Fifth Circuit in *Sam L. Majors Jewelers* stated that "a cause of action against an interstate air carrier for claim for property lost or damaged in shipping arises under federal common law." 117 F.3d 922, 929 n.16.[2] The Second Circuit concurs, "agree[ing] with

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[2] Notably, the Fifth Circuit appeared to acknowledge that its conclusion conflicted with the decision of the Sixth Circuit in *Musson*. *Sam L. Majors*, 117 F.3d at 927 n.9; *see also Greer v. Federal Express Corp.*, 66 F. Supp. 2d 870, 874 (W.D. Ky. 1999) (noting conflict between the decisions).

those courts . . . that hold that federal common law continues to control the issue of liability of air carriers for lost or damaged shipments even after deregulation." *Nippon*, 235 F.3d at 59. The Fourth Circuit likewise relied on federal common law to support federal question jurisdiction over a case raising "claims involving shipments in interstate commerce by air carriers." *McCall-Thomas*, 81 F.3d at 30 n.*. To these post-*Wolens* decisions the Third and Eighth Circuits have never overruled pre-*Wolens* decisions holding that federal common law governs such breach-of-contract claims. *Arkwright*, 767 F.2d at 427 (citing "Congress' retention of significant control over air transportation" and holding that "federal law rather than state law" governs the enforceability of a limited liability clause in an air cargo contract); *First Pennsylvania Bank*, 731 F.2d at 1115 (holding that "federal law, rather than Pennsylvania law, governs the enforceability" of a limited liability clause in an air cargo contract).

2. Two Circuits have reached the exact opposite result. In *Musson*, the plaintiff sought damages for the alleged fraud and negligent misrepresentation of the defendant air carrier by arguing that both claims arose under federal common law. 89 F.3d at 1247-48. The Sixth Circuit noted that in *Wolens*, this Court "expressly rejected the possibility that the ADA leaves room for a federal common law cause of action against air carriers, at least in regard to breach of contract claims." *Id.* at 1251. The Sixth Circuit then applied the reasoning of *Wolens* to hold that the ADA does not create a federal cause of action for breach of contract or fraud against an air carrier, and that state law continues to govern contract suits against an airline. *Id.* at 1251-52.[3]

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[3] Several district court opinions have recognized that the Sixth Circuit's decision in *Musson* conflicts with other circuit cases. *See*,

The Seventh Circuit's decision in *Travel All Over* mirrors the conclusions of the Sixth Circuit. In *Travel All Over*, the plaintiff sought damages for the alleged breach of an airline's agreement to honor reservations booked by the plaintiff agency. The airline successfully moved to dismiss the complaint on the ground that the entire action was preempted by the ADA. The Seventh Circuit disagreed, holding that the plaintiff's contract claim alleged no "violation of a state-imposed obligation[]," as the "terms and conditions in the contract" between the parties arose from a "privately ordered" transaction. *Travel All Over*, 73 F.3d at 1432. Moreover, the Seventh Circuit expressly rejected the airline's argument that certain contracts related to air rates, routes, or services may not be enforced under state law. Rather, the court noted that "*Wolens* did not distinguish between various types of contracts" arising between airlines and their customers. *Id.*

The United States has filed an amicus brief in which it agrees with the Sixth and Seventh Circuits' views. In the *Sam L. Majors Jewelers* case, the government argued that "the federal regulatory scheme does not create an express or implied cause of action for air cargo claims. There is thus no basis for assuming removal jurisdiction on the theory that Congress has substituted a federal cause of action for actions premised on state law." Br. for the United States as Amicus

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e.g., *Strategic Assets, Inc. v. Federal Express Corp.*, 190 F. Supp. 2d 1065, 1069 (M.D. Tenn. 2001) (noting that "to the extent that other Circuits have concluded that [the ADA] preserved a federal law cause of action in negligence or contract for delayed shipments, such a rule is also at odds with *Musson*"); *Greer*, 66 F. Supp. 2d at 873 (concluding that "to the extent the Fifth Circuit found a prior federal common law cause of action saved by the ADA or its predecessors, it is at odds with *Musson*").

Curiae, *Sam L. Majors Jewelers v. ABX Air, Inc.*, 1997 WL 33560672, at *14 (Apr. 18, 1997).

3. In total, therefore, eight circuit courts have reached three different conclusions regarding this Court's interpretation of the ADA's preemption clause. The Second, Third, Fourth, Fifth, and Eighth Circuits hold that any claim for lost or damaged property against an air carrier arises under federal common law, while the Sixth and Seventh Circuits hold that no federal cause of action exists for contract claims against an airline. The United States has taken the position that the Sixth and Seventh Circuits are correct. Br. for the United States as Amicus Curiae, *Sam L. Majors Jewelers*, 1997 WL 33560672, at *16 (concluding that the decision in *Musson* is "better reasoned and more consistent with the modern rule tightly circumscribing the judiciary's power to fashion a federal common law"). The Ninth Circuit's decisions in *Read-Rite* and in the present case create a third approach based on a seemingly limitless view of federal common law post-enactment of the ADA that allows federal jurisdiction over 1) claims for loss or damage by interstate common carriers by air; 2) suits seeking enforcement of a limited liability provision in an air carrier's contract; and 3) actions seeking damages for breach of an air carrier's contract that require no analysis of common law rights or policies. Pet App. 28a. The Ninth Circuit's interpretation of the ADA alone presents a compelling need for this Court's review. When added to the post-*Wolens* decisions of the Second, Fourth, Fifth, and Seventh Circuits, these applications of *Wolens* threaten to "resurrect[] the federal courts' ability to decide cases according to their own ideas about appropriate commercial law principles." *Musson*, 89 F.3d at 1251.

4. The divergent approaches of the circuit courts have created more than an academic difference of opinion. Instead,

the holdings of *Musson* and *Travel All Over* make clear that Petitioners' claims in this matter would have been decided differently had the case arisen within the Sixth or Seventh Circuits. *Musson* unequivocally holds that *Wolens* "rejected . . . a federal common law cause of action" for breach-of-contract, meaning the ADA does not permit the exercise of federal question jurisdiction over breach-of-contract claims. 89 F.3d at 1251-52. *Travel All Over* makes clear that *Wolens* "did not distinguish between various types of [airline] contracts," thus indicating that the ADA does not preempt contract claims based solely on privately ordered transactions. 73 F.3d at 1432; *see also Strategic Assets*, 190 F. Supp. 2d at 1069 (finding no basis for federal jurisdiction over ordinary contract claim and remanding action to state court); *Greer*, 66 F. Supp. 2d at 873 (same).

Both decisions, therefore, demonstrate that Petitioners' "routine . . . claim for breach of contract" that "hinge[ed] upon the interpretation of 'strike' and 'national transportation network' within the terms of the contract itself," Pet. App. 28a, would not have stated a federal claim in the Sixth or Seventh Circuits, and hence would have been remanded to state court for lack of subject matter jurisdiction. *See Musson*, 89 F.3d at 1252; *Travel All Over*, 73 F.3d at 1432. That result, and the corresponding impact on the doctrines of federal jurisdiction established since *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), requires this Court's intervention.

D. The Circuit Conflict Arising From *Wolens* Is Mature And Shows No Sign Of Abating

As a matter of federal-state comity, it is important for this Court to clearly define the extent to which Congress has preempted state law contract claims against airlines. This Court noted in *Wolens* that the ADA "contains no hint" of

congressional intent to channel the range of state law contract claims against air carriers into federal courts. 513 U.S. at 232. *Wolens* addressed this potential tension between the roles of state and federal courts by limiting the ADA's preemption clause to claims that seek to impose state laws and regulations related to airline rates, routes, or services. *Id.* at 232-33; *see also Travel All Over*, 73 F.3d at 1432. Despite this Court's guidance, that tension remains at the forefront of suits involving air carrier contracts, as the circuit and district courts have issued conflicting decisions recognized by three Justices of this Court. *See Northwest Airlines, Inc. v. Duncan*, 531 U.S. 1058 (2000) (O'Connor, J., dissenting from a denial of certiorari) (joined by Rehnquist, C.J., and Thomas, J.).

This case presents an ideal vehicle for this Court to reconcile the circuit conflict over the proper boundaries for the exercise of federal judicial power and its concomitant erosion of the foundations of state contract law. Although the appropriateness of federal common law and the sufficiency of federal jurisdiction were not expressly addressed by the Ninth Circuit below, the court's position has been fully explained in its prior opinions in *Read-Rite* and the *en banc* decision in *Charas*.[4] The decisions of the Second Circuit in *Nippon*, and the Fifth Circuit in *Sam L. Majors Jewelers* are equally

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[4] Given the Ninth Circuit's well-established position that federal common law governs contract claims against air carriers, Petitioners had no good-faith basis on which to oppose removal, or to press the issue before the Ninth Circuit. Instead, the question of whether the Ninth Circuit's erroneous interpretations of the ADA in prior decisions precluded the exercise of subject matter jurisdiction in this action is properly addressed to this Court. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998); Fed. R. Civ. P. 12(h)(3).

comprehensive,[5] as are the conflicting opinions of the Sixth Circuit in *Musson* and the Seventh Circuit in *Travel All Over*. Each of these decisions fully examined the dispositive legal issues, including the text and history of the ADA, the preemption and savings clauses, this Court's decisions in *Morales* and *Wolens*, and the policy considerations supporting the application of federal or state law. *Nippon*, 735 F.3d at 59; *Read-Rite*, 186 F.3d at 1195-98; *Charas*, 160 F.3d at 1262-66; *Musson*, 89 F.3d at 1249-52; *Sam L. Majors Jewelers*, 117 F.3d at 928-29; *Travel All Over*, 73 F.3d at 1430-32.

Moreover, this case arises from opposing motions for summary judgment and thus presents a record containing essentially undisputed facts. In addition, the Petitioners raised, only claims for breach-of-contract. Therefore, this case does not implicate unsettled questions of law regarding the ADA's preemption of state tort claims. *See Wolens*, 513 U.S. at 237 (Stevens, J., concurring in part and dissenting in part) (stating that the ADA does not "given airlines free rein to commit negligent acts"); *id.* at 242-43 (O'Connor, J., concurring in the judgment and dissenting in part) (expressing view that the ADA does not preempt all personal injury

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[5] Notably, the Fifth Circuit cautioned that its decision in *Sam L. Majors* was "heavily influence[d]" by the prior decisions of the Ninth Circuit in *Deiro* and the Third Circuit in *First Pennsylvania Bank*. 117 F.3d at 929 n.16. The Fifth Circuit noted that its decision to apply federal common law as the rule of decision stemmed largely from the "policy consideration that circuit splits, especially in the circumstance of this case in which the national uniformity of a single rule is of vital importance, are to be avoided." *Id.* The Fifth Circuit's candid admission that its decision was largely the result of prudential concerns, rather than statutory interpretation, illustrates that only this Court can effectively resolve the conflicts recognized by the circuit courts.

claims); *Morales*, 504 U.S. at 390 (suggesting limits to the ADA's preemption clause).

II. THE FEDERAL COURTS ARE DIVIDED OVER WHETHER THE ADA PREEMPTS COURTS FROM USING CORE STATE LAW CONTRACT DOCTRINES TO RESOLVE CONTRACT CLAIMS AGAINST AIRLINES

Even if the exercise by federal courts of jurisdiction over contract disputes between air carriers and their customers is correct in the aftermath of the ADA and *Wolens*, this case presents a second issue that has divided the courts: whether the ADA preempts traditional state contract law principles needed to resolve those contractual disputes.

A. Different Circuits Selectively Apply State Law Contract Doctrines In Construing The Terms Of Private Airline Agreements

The confusion among circuits regarding the proper application of *Wolens* further extends to whether the ADA limits the range of contract principles that may be considered by a federal court adjudicating claims based on the breach of an air carrier's agreement. In *Wolens* this Court noted without elaboration that "some state-law principles of contract law . . . might well be preempted to the extent they seek to effectuate the State's public policies, rather than the intent of the parties." *Wolens*, 513 U.S. at 233 n.8. This Court did not, however, specify how the lower courts should determine which state-law principles are preempted by the ADA and noted only that "[b]ecause contract law is not at its core 'diverse, nonuniform, and confusing,'" the enforcement of air carrier contracts under state law poses little threat to the uniform deregulation envisioned by Congress. *Id.* (quoting *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 529 (1992) (plurality opinion)).

A number of lower courts, however, have interpreted that statement in *Wolens* to hold that the ADA preempts a broad range of contract doctrines. For example, in *United Airlines v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), the Seventh Circuit extended *Wolens* to preempt not only state anti-fraud statutes, but also "common law rules against fraudulent inducement." *Id.* at 609-10. In contrast, the Fifth Circuit in *Lyn-Lea v. Travel Corp. v. American Airlines, Inc.*, 283 F.3d 282 (5th Cir. 2002) held that the common law defense of fraudulent inducement was not preempted under *Wolens* and the ADA. *Id.* at 290 (holding that fraudulent inducement "related to the validity of mutual assent" and "does not reflect a state policy seeking to expand or enlarge the parties' agreement"). *See also, Imperial News Co., Inc. v. P-I-E Nationwide, Inc.*, 905 F.2d 641, 645 (2d Cir. 1990) (pre-*Wolens* decision finding estoppel doctrine relevant)

Several district court decisions have also held that the ADA preempts common law contract doctrines. *See, e.g., King Jewelry, Inc. v. Federal Express Corp.*, 166 F. Supp. 2d 1280 (C.D. Cal. 2001), *aff'd*, 316 F.3d 961 (9th Cir. 2003) (finding doctrines of waiver and estoppel preempted by the ADA); *Breitling U.S.A., Inc. v. Federal Express Corp.*, 45 F. Supp. 2d 179 (D. Conn. 1999) (concluding that the doctrine of waiver is preempted); *Williams v. Federal Express Corp.*, No. 99-06252, 1999 WL 1276558 (C.D. Cal. Oct. 6, 1999) (finding that the doctrine of unclean hands is preempted); *SVT v. Federal Express Corp.*, No. 94-3057, 1997 WL 285051 (N.D. Cal. May 19, 1997) (state law doctrine entitling shipper to rescind a contract where the carrier deviated from the agreed performance is preempted); *but see Power Travel Int'l, Inc. v. Am. Airlines, Inc.*, 257 F. Supp. 2d 701 (S.D.N.Y. 2003) (finding the implied duty of good faith and fair dealing is not preempted by the ADA). State appellate courts have also evinced confusion on the impact of the ADA's

preemption clause on state contract law. *See, e.g., Howell v. Alaska Airlines*, 994 P.2d 901 (Wash. Ct. App. 2000) (holding that the ADA preempts a host of common law doctrines including impossibility, frustration, illusory promises, unconscionability, the duty of good faith and fair dealing, and unjust enrichment).

These inconsistent applications of core contract doctrines such as fraudulent inducement, waiver, and estoppel lead to the very "diverse, nonuniform, and confusing" results that this Court alluded to in *Wolens*. 513 U.S. at 233 n.8 (citation omitted). At present, the application of core contract doctrines envisioned by this Court through normal state-law principles has given way to a confusing collection of outcome-determinative principles, where the meaning (or even existence) of an air carrier's contract varies by circuit based on amorphous "principles" of federal common law that has no body of fixed and settled foundation. If federal courts are permitted to select which aspects of contract law govern a commercial dispute—as with the Ninth Circuit's unexplained and selective use of the Restatement of Contracts rather than applicable state law—parties to air cargo contracts will shop the federal courts for the set of rules most favorable to their claim. This Court's guidance on the role of contract doctrines in air carrier agreements is thus necessary to fulfill Congress's intent to give parties fair notice of which legal principles will govern such contract disputes.

B. The ADA Requires That Consumers And Air Carriers Retain State Law Remedies To Enforce Their Agreements

This case directly raises questions regarding the core contract doctrines that survive the ADA's enactment, including the widely followed principle of *contra proferentum*, and the well-established equitable doctrines of

waiver and futility. *See generally Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995) (applying the doctrine of *contra proferentum* and noting the "rule of contract interpretation that a court should construe ambiguous language against the interest" of the drafter). Each of these concerns has been thoroughly considered by the circuit and district courts in opposing motions for summary judgment resolving the Petitioners' breach-of-contract claims. Accordingly, this case presents pure questions of law against largely undisputed facts for this Court's review.

The uncertainty among courts addressing these issues has enormous financial consequences for the commercial air transportation industry. Air customers and carriers alike need to know what interests will be protected before they enter into an agreement. In *Wolens*, this Court explained that the ADA was designed to promote reliance on market forces and that "[m]arket efficiency requires effective means to enforce private agreements." 513 U.S. at 230. The decision below not only frustrates the clear intent of Congress to retain state law remedies for breach-of-contract, it undermines the effective enforcement of contractual disputes, and thereby erodes the very confidence in the free market Congress sought to promote with the ADA. *Id.* (noting that the "reality" of efficient contract enforcement "is key to sensible construction of the ADA"). If permitted to stand, the Ninth Circuit's holding will only further the uncertainty surrounding the rights and responsibilities created by air carrier contracts.

Here, the Ninth Circuit determined that the district court erred in concluding that Petitioners' compliance with the notice requirements (that it found implicit in the contract) should be excused under the doctrine of futility. *But see* 13 Williston on Contracts § 39:39 (4th ed. 2000) (defining futility as the waiver of a condition precedent where "the promisor is not going to keep his promise in any event"). In

addition, the Ninth Circuit relied exclusively on a selective reading of the Restatement of Contracts to hold that FedEx's own interpretation of the ambiguous terms in the Service Agreement governed the parties' contract, despite the clearly contrary principle contained in Restatement (Second) of Contracts § 206 ("In choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds."). The outcome of this case thus turns entirely on the choice of contract law permissible under the ADA. This case offers an appropriate context for this Court to make clear that the ADA does not preempt core principles of state contract law necessary to the interpretation of agreements between air carriers and their customers.

CONCLUSION

The petition for a writ of certiorari should be granted.

January 28, 2004

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-56158, No. 02-56234

[Filed September 30, 2003]

ON THE HOUSE SYNDICATION, INC., on behalf of themselves and all others similarly situated; CAREY BROS INC., on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

FEDERAL EXPRESS CORPORATION,

Defendant - Appellee.

ON THE HOUSE SYNDICATION, INC., on behalf of themselves and all others similarly situated; CAREY BROS INC., on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

FEDERAL EXPRESS CORPORATION,

Defendant - Appellant.

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

A majority of the panel has voted to deny Appellants' petition for rehearing, filed on September 24, 2003. The petition for rehearing is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-56158, No. 02-56234

[Filed September 3, 2003]

ON THE HOUSE SYNDICATION, INC., on behalf of themselves and all others similarly situated; CAREY BROS INC., on behalf of themselves and all others similarly situated,

Plaintiffs - Appellants,

v.

FEDERAL EXPRESS CORPORATION,

Defendant - Appellee.

ON THE HOUSE SYNDICATION, INC., on behalf of themselves and all others similarly situated; CAREY BROS INC., on behalf of themselves and all others similarly situated,

Plaintiffs - Appellees,

v.

FEDERAL EXPRESS CORPORATION,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of California
D.C. No. CV-99-01336-RMB(JFS)
D.C. No. CV-99-01336-RMB
Rudi M. Brewster, District Judge, Presiding

Before: SILVERMAN, W. FLETCHER, and RAWLINSON, Circuit Judges.

MEMORANDUM*

On July 31, 1997, Defendant Federal Express ("FedEx") issued a press release notifying its customers of an impending strike at United Parcel Service ("UPS") and detailing the measures it was taking to avoid disruptions in service. In that press release, FedEx stated: "*As provided in our Service Guide* and until further notice, we will not offer money-back guarantees." (Emphasis added.) The above quoted language did not purport to amend the Service Guide; rather, it purported to be consistent with it. The clear import of the language is that FedEx believed that the UPS strike triggered the *force majeure* clause in the Service Guide and relieved it of its obligation to pay the Money-Back Guarantee. Customers who contracted with FedEx during the Class Period were, or should have been, aware of FedEx's interpretation of its Service Guide. Any shipment after the date of the press release must be presumed to have been made with knowledge not only of the Service Guide itself, but also of FedEx's interpretation of that Guide in the context of the UPS strike.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Because of FedEx's construction of the Service Guide reflected in the July 31 press release, we hold that FedEx did not breach its Money-Back Guarantee provision during the Class Period. Any reasonable person reading FedEx's press release of July 31 could come to only one conclusion: Until further notice, FedEx was not offering money-back guarantees. *See* REST. (SECOND) OF CONTRACTS § 201 (2003) (explaining that where the first party "did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party," the contract term shall be interpreted according to the meaning attached by the first party). The judgment in favor of Plaintiffs on the Money-Back Guarantee claim is therefore reversed.

We affirm the district court's judgment in favor of Defendant on the Excess Charges claim. To the extent Plaintiffs rely on the "Invoice Adjustment" provision in the Service Guide, they offer no excuse for their failure to comply with the notice requirements set forth in that provision. The provision states that requests for invoice adjustment "must be received within one year after the date of shipment if the overcharge was caused by [FedEx]." Neither the July 31 press release nor the telephonic recording purported to suspend or otherwise affect a customer's right to request invoice adjustment. Plaintiffs are therefore barred from recovering on this theory.

To the extent Plaintiffs cast their Excess Charges Claim as a traditional common law suit for damages due to breach of contract, the claim is also barred by Plaintiffs' failure to comply with the contractual notice requirements. The Service Guide expressly states that FedEx "must receive written notice of claim due to damage [or] delay ... within 15 days after delivery of the shipment" and "within 90 days after [FedEx] accept[s] shipment" for all other claims. Nothing in

the July 31 press release or the telephonic recording purported to suspend a customer's right to pursue a claim for damage against the company.

Plaintiffs argue that the Service Guide does not expressly state that compliance with the internal claims procedures is a prerequisite to bringing a damages action in court. While this is true, the Service Guide does use mandatory language and it expressly states that the "FAILURE TO COMPLY WITH [THE] [NOTICE] CONDITION[S] MAY RESULT IN THE DENIAL OF A CLAIM." Other cases that have addressed the FedEx Service Guide's notice of claim provisions have interpreted them as requiring compliance as a prerequisite to suit. *See, e.g., Williams v. Federal Express Corp.*, 1999 U.S. App. LEXIS 33137, 1999 WL 1276558 at * 4 (C.D. Cal. 1999) ("Read together, the airbill and Service Guide require that written notice of claim be filed within ninety days after FedEx accepts a package for shipment ... Because Williams failed to file a claim within ninety days after FedEdx accepted the shipment, he cannot recover damages.").

We need not reach the remaining issues raised on appeal.

REVERSED IN PART; AFFIRMED PART. Each side to bear its own costs on appeal.

CONCURRENCE

SILVERMAN, Circuit Judge, concurring:

I fully concur in the portion of the Memorandum affirming the judgment in favor of Federal Express on the excess charges claim. As for the judgment in favor of the plaintiffs on their claim that FedEx breached its money back guarantee, I agree that reversal is required but, respectfully, for a

different reason. As I see it, the press release issued on July 31, 1997 plainly amended the Service Guide.

The Service Guide provided for a money-back guarantee for late delivery. It also stated how FedEx could amend the Service Guide:

> FedEx reserves the right, and only by authorization of its Senior Vice President of Marketing and Corporate Communications or successor positions, unilaterally, and from time to time, in writing, to modify, amend or supplement the rates, features of service and Service Conditions in this Service Guide applicable to all customers without notice, but no other agent or employee of FedEx, nor any other person or party, is authorized to do so.

The press release of July 31, 1997 made specific reference to the Service Guide and clearly stated that money-back guarantees would not be offered until further notice. The press release was (1) in writing and (2) authorized by FedEx's Senior Vice President of Marketing and Corporate Communications, the official designated in the Service Guide to be the only FedEx person empowered to amend the Service Guide. By the terms of the Service Guide itself, a *writing* authorized by the *designated official* were the only two prerequisites to amending the Service Guide. FedEx did not have to say "Simon says" or "Mother, may I." Perhaps the press release could have been written better or with more legalese. Regardless, no reasonable person could have been left with any doubt whatsoever that FedEx was suspending the money-back guarantee until further notice. Indeed, in invoking the futility doctrine as a defense to their failure to submit a notice of claim, the plaintiffs themselves freely admit

that FedEx's suspension of the money-back guarantee was "widely publicized."

Nor is an authorized writing disqualified as an amendment just because it has been widely disseminated or released to the press. If anything, the law should encourage wide dissemination of unilateral modifications to contracts such as those involved here, lest customers be misled.

It is true that eight days after the press release, FedEx's Senior Vice President of Marketing and Corporate Communications, T. Michael Glenn, promulgated a more formal amendment to the Service Guide. This does not mean that the July 31 writing did not amend the Service Guide. The August 8 writing was simply the formal documentation of the less formal but written action taken by Glenn on July 31. The formal amendment issued by Glenn on August 8 specifically purports to be "effective July 31, 1997" and to be "pursuant to my previous written approval."

It is not at all unusual for parties to make legally binding commitments, the formal documentation of which follows in due course. One example is an insurance agent's binder, which is effective immediately to provide coverage even though the formal insurance policy does not issue until much later. Another example is an oral stipulation made in open court to settle a lawsuit on certain terms, which is eventually followed by a formal settlement agreement containing those terms plus the customary settlement boilerplate. This is a commonplace occurrence.

Because FedEx effectively amended its Service Guide on July 31, 1997 to suspend the money-back guarantee until further notice, it did not breach its contract by failing to honor

the guarantee after that date. It is for that reason that I would reverse the district court's judgment in favor of the plaintiffs.

DISSENT

RAWLINSON, Circuit Judge, dissenting:

I respectfully dissent from the majority disposition, because Fed Ex's newly minted argument that its press release did not purport to amend the Service Guide is simply not supported by the record in this case, and because Fed Ex's notice of claim requirement could not serve to bar Plaintiffs' action.

In its Answer to the Complaint, Fed Ex admitted that it "amended its July 1, 1997 Service Guide effective July 31, 1997 to, among other things, suspend its Money-Back Guarantees." (Excerpts of Record 37). Fed Ex included this admission as an "undisputed fact" (ER 861), and argued it before the district court (ER 333).

Fed Ex continued the amendment theme in its briefs on appeal (Red Brief at 13 and Gray Brief at 3) and at oral argument, until a question from one of the panel members alerted Fed Ex's counsel that it might be wise to abandon the amendment argument.

The fact is that the Press Release did not reference the *force majeure* clause in the Service Guide or rely upon it. The Press Release was an ineffective attempt to amend the Service Guide, as reflected by Fed Ex's subsequent amendment of the Service Guide in accordance with its provisions.

The majority disposition cites the Restatement of Contracts for the proposition that because Fed Ex "did not know of any different meaning [of the Press Release] attached by [the Plaintiffs] and [the Plaintiffs] knew the meaning attached by [Fed Ex]," the Service Guide must be interpreted as Fed Ex urges. However, the record in this case contains no evidence that Fed Ex "did not know of any different meaning attached by" its customers. The record is silent on that point. There is also nothing in the record reflecting that Fed Ex's customers "knew the meaning attached by [Fed Ex to the Press Release]." To the contrary, one reading the Press Release could easily be confused as to exactly what Fed Ex intended to convey. The Press Release statement that "as provided in our Service Guide and until further notice, we will not offer money-back guarantees" conflicts directly with the Service Guide provision offering a money-back guarantee if the package was not delivered as promised. A customer reading the Press Release and the Service Guide together would not inevitably conclude that Fed Ex's unstated reliance on the *force majeure* clause was the basis for its suspension of the money-back guarantee. As the district court recognized, a customer could more readily conclude that Fed Ex was bound by the money-back guarantee as provided in its Service Guide. Because the portion of the Restatement of Contracts cited in the majority disposition is not germane to this case, and no case authority undergirds the conclusion reached by the majority on this point, I cannot join the majority's ruling on the Press Release issue.

There is case authority on the notice-of-claim issue which, in my view, is contrary to the majority holding that Plaintiffs' failure to comply with Fed Ex's internal claims procedures bars the filing of a damages action in court.

We recently addressed a similar issue in *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1218, n.5 (9th Cir. 2003). We rejected Granite's argument, similar to that urged by Fed Ex, that the insurance policy's claim requirement imposed a de facto statute of limitations upon the filing of a subrogation action. We held that "'claim,' in the context of the Granite insurance policy, refer[red] to notice rather than the filing of a complaint." Analogous reasoning applies to the Fed Ex Service Guide notice-of-claim provision. No principled basis exists to distinguish Fed Ex's notice-of-claim provision from Granite's. Therefore, I read our precedent as dictating a ruling that Fed Ex's notice-of-claim provision merely gives notice to Fed Ex for payment of claims, rather than imposing limitations upon the Plaintiffs' ability to bring a damages action.

In summary, I would uphold the district court's ruling that Fed Ex's Press Release did not effectively amend the Service Guide, and hold that the notice-of-claim provision did not bar Plaintiffs' action against Fed Ex. Accordingly, I respectfully register my dissent.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 02-56158, No. 02-56234

[Filed September 3, 2003]

ON THE HOUSE SYNDICATION, INC., on behalf of themselves and all others similarly situated; CAREY BROS INC., on behalf of themselves and all others similarly situated
Plaintiffs - Appellants

v.

FEDERAL EXPRESS CORPORATION,
Defendant - Appellee

ON THE HOUSE SYNDICATION, INC., on behalf of themselves and all others similarly situated; CAREY BROS INC., on behalf of themselves and all others similarly situated
Plaintiffs - Appellees

v.

FEDERAL EXPRESS CORPORATION
Defendant - Appellant

Appeal from the United States District Court
for the Southern District of California
D.C. No. CV-99-01336-RMB(JFS)
D.C. No. CV-99-01336-RMB
Rudi M. Brewster, District Judge, Presiding

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California (San Diego) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part and REVERSED in part. Each side to bear its own costs on appeal.

Filed and entered September 3, 2003

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 99CV 1336B JFS

[Filed June 17, 2002]

ON THE HOUSE SYNDICATION, INC., CAREY BROS., INC., Plaintiffs,	)
v.	)
FEDERAL EXPRESS CORPORATION and DOES 1 through 20, inclusive, Defendant.	)

ORDER AND JUDGMENT

JUDGE: Hon. Rudi M. Brewster

This matter comes before the Court on Plaintiffs' Motion for Partial Summary Judgment and for an Order Directing the Entry of Final Judgment (the "Motion"). Upon consideration of the Motion and the memoranda and arguments by the parties with respect thereto, as well as all other pleadings and papers in this matter, the Court hereby finds as follows:

A. The above-captioned class action litigation is pending

on behalf of Plaintiffs and a class previously certified pursuant to Rule 23(b) (3), Fed. R. Civ. P., consisting of: all individuals, corporations, or other entities that made one or more domestic shipments through Defendant Federal Express Corporation ("Defendant" or "FedEx") during the period from July 31, 1997 through August 7, 1997 (the "Class Period"), which were delivered 60 seconds or more after the applicable delivery commitment, and whose contract with FedEx provided a money-back guarantee in the event of such a late delivery (the "Class"). Excluded from the Class are FedEx, any person, firm, trust, corporation, officer, director or other individual or entity in which FedEx has a controlling interest or which is affiliated with it, and the legal representatives, heirs, successors-in-interest or assigns of any such excluded party. Also excluded from the Class are all federal, state and local government entities, a list of which has previously been filed with the Court.

B. On April 6, 2000, this Court granted partial summary adjudication as to liability for breach of contract with respect to the named Plaintiffs' claims for a refund of transportation charges for shipments delivered late that were sent from July 31, 1997 (the date that FedEx ceased honoring its money-back guarantee) through August 7, 1997 (the day before FedEx amended its Service Guide to formally suspend its money-back guarantee). The summary adjudication related only to late deliveries as to which FedEx did not identify a specific reason for the delay other than the UPS strike. The Court granted FedEx's motion for summary judgment as to named Plaintiffs' other claims.

C. Pursuant to a prior Order of the Court, counsel for Plaintiffs distributed a Notice of Class Action by first class mail to all persons identified as members of the Class whose addresses were reasonably available to the parties, and

published a Summary Notice of Class Action in various newspapers. The deadline for Class members to opt-out of the Class has passed, and the record in this action now accurately reflects the identity of all Class Members who elected to opt-out of the Class. The Court finds that all Class Members who signaled their intent to opt-out of the Class through May 31, 2002, including those whose opt-out correspondence was incomplete or who opted-out after the previously published deadlines (all of which expired prior to May 31, 2002), the identity of which is found in previous filings with the Court, are excluded from the Class.

D. The Court hereby finds and concludes that the notice to the Class provided in this case constituted the best notice practicable under the circumstances, and fully satisfied the requirements of Rule 23(c) (2) of the Federal Rules of Civil Procedure and of due process.

E. For the reasons previously stated on the record and in its prior Orders in this action, the Court finds that there are no genuine issues of material fact and that the Class, and each member thereof, is entitled to a judgment on liability in its favor as a matter of law with respect to the claim that FedEx breached its contracts with Class members when it failed to honor the money-back guarantee during the Class Period for shipments whose delay in delivery was attributed by FedEx to the effects of the UPS strike.

F. For the reasons previously stated on the record, all Class members shall be required to submit a proof of claim form to share in the monetary award as hereinafter provided by this judgment. The precise form and wording of the Notice to be sent to Class members advising them of such proof of claim requirement will be determined by the Court at a later date after this judgment has become final and any appeals

have been decided or the time to appeal has expired (the "Effective Date"). The proof of claim form will include, among other things, requirements that Class members consent to the jurisdiction of this Court and, where applicable, to the summary dispute resolution procedures set forth below.

G. FedEx's obligation to pay the portion of the monetary award in this judgment allocable to any individual Class member shall be deemed satisfied in full if the Class Member fails to return the required proof of claim form by the deadline specified by the Court.

H. For the reasons previously stated on the record, FedEx's obligation to pay the portion of the monetary award in this judgment allocable to any individual class member shall be deemed satisfied if and to the extent FedEx has a set-off right against that Class member (because such Class member is more than sixty (60) days in arrears on its FedEx account). In the claims administration and distribution process, FedEx also shall be entitled to a set-off against the portion of the monetary award in this judgment allocable to any individual Class member for any previously adjudicated claim on which FedEx has prevailed against a member of the Class and that remains unpaid, or for a settlement that compromised a claim against a member of the Class and that remains unpaid. FedEx shall file and serve a list of any and all such adjudicated or settled set-off claims and a brief statement of the basis therefore, within ninety (90) days of the Effective Date. To the extent payments are subsequently obtained by FedEx with respect to these accounts, it shall appropriately credit the account(s) and adjust the amount of any set-offs accordingly.

I. To resolve set-off claims that have not been adjudicated or compromised, the Court will implement the

following procedures during the claims administration and distribution process:

1. Prior to any distribution to the Class, FedEx shall serve and file in electronic form a list of class members as to whom it asserts a set-off claim, specifying the following matters : (i) name on the account ; (ii) address on the account; (iii) account number; (iv) amount claimed; and (v) a short statement of the basis for the claim (if other than delinquency in payment of the account for more than sixty (60) days).

2. Class counsel will send each such Class Member a Notice, in a form to be approved by the Court, stating that FedEx has asserted a set-off against all or part of the Class Member's share of the monetary award under this judgment, and that such set-off will be considered undisputed unless a statement of opposition is submitted by the Class Member on or before the deadline specified in the Notice.

3. FedEx's obligation to pay the portion of the monetary award under this judgment allocable to any Class member who receives such Notice of FedEx's set-off, but fails to respond within the time provided, shall be deemed satisfied up to the amount of the set-off claimed by FedEx, and as adjusted for any subsequent payments received from such Class Member on the account.

4. Any claims by FedEx for a set-off that remain unresolved after issuance of the Notice will be decided by a Special Master to be appointed by the Court. The fees and expenses of the Special Master shall be approved by the Court and shall be paid as an expense of this litigation from the recovery obtained by the Class.

5. Each Class member who returns a statement of opposition, and thus disputes FedEx's claim to a set-off, will be required to assent to a simplified procedure for the resolution of such disputes by the Special Master based upon brief written submissions and a waiver of any rights to appeal. If such a Class member declines to assent to that procedure, it shall be excluded from the Class, without prejudice to the rights of FedEx or the Class member, and shall not be bound by the results of this action. In addition, the amount of the monetary award under this judgment allocable to such Class member shall be reduced accordingly.

6. FedEx shall credit each Class member's account in the amount that corresponds to the amount of satisfaction of the monetary award that it obtained as a result of assertion of its set-off right.

J. Unless otherwise provided by this judgment, or by separate Order of the Court, FedEx's claim to a set-off, and the amount thereof, shall be determined as of the Effective Date.

K. Subject to the foregoing, the Court hereby enters judgment in favor of the Class and against FedEx in the total amount of $68,402,239.62. That figure consists of $53,402,581.89, which represents the total amount of transportation charges assessed by FedEx against Class members for late deliveries during the Class period where the delay in delivery was attributed by FedEx to the effects of the UPS strike, plus prejudgment interest of $14,999,657.73, computed through June 17, 2002. Payment of an individual Class member's share of this monetary award is subject to the conditions set forth above. The Court finds, pursuant to Fed.

R. Civ. P. 54(b), that there is no just reason for delay and the Court hereby directs entry of a final judgment.

L. Plaintiffs' counsel shall submit their bill of taxable costs within ten days of the date hereof. Plaintiffs' counsel shall submit an application for attorneys' fees and costs that are requested from the fund within 30 days of the creation of a Class recovery fund through payment of the judgment after the Effective Date.

M. The Court reserves jurisdiction over this action and over any and all further proceedings concerning the administration and consummation of this matter.

N. This judgment reflects the Court's resolution of disputed issues, and all parties retain their rights to appeal any or all of the provisions hereof and of the Court's prior rulings in this matter.

Dated: June 17, 2002

/s/_____
Rudi M. Brewster
U.S. DISTRICT COURT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 99CV 1336-B (JFS)

[Filed April 6, 2000]

ON THE HOUSE SYNDICATION, INC. And CAREY BROS., INC., Plaintiffs,	)
v.	)
FEDERAL EXPRESS CORPORATION and DOES 1 - 20, Defendants.	)

ORDER

(1) GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

(2) GRANTING IN PART AND DENYING IN PART PLAINTIFFS' CROSS MOTION FOR SUMMARY ADJUDICATION

I. Summary

Before this Court are Defendant Federal Express Corporation's ("Defendant") motion for summary judgment and Plaintiffs On The House Syndication, Inc. and Carey Bros., Inc.'s ("Plaintiffs") cross motion for summary adjudication. After careful consideration, the Court GRANTS in part and DENIES in part Defendant's motion for summary judgment and GRANTS in part and DENIES in part Plaintiffs' cross motion for summary adjudication.

In summary, the Court makes the following analysis and findings:

(1) The Court first considers whether a contract between Plaintiffs and Defendant existed and if there was a breach of that contract. The Court finds, nor do the parties dispute, that both Defendant's Airbill and Service Guide constituted the contract between Plaintiffs and Defendant. Also, the Court finds that Defendant breached the agreement;

(2) The Court then considers whether the Airline Deregulation Act ("ADA") preempts Plaintiffs' breach of contract action against Defendant thereby precluding Plaintiffs from pursuing their claim. The Court finds that Plaintiffs' claim is "routine" and not preempted by the ADA,

(3) Next the Court considers the applicability of Defendant's disclaimer to the case at hand. The Court finds that Defendant's disclaimer is inapplicable;

(4) The Court also considers whether Defendant effectively amended its Service Guide on July 31, 1997,

suspending its money-back guarantee policy. The Court finds that Defendant did not effectively amend its Service Guide until August 8, 1997;

(5) Lastly, the Court determines the proper relief to award Plaintiffs. The Court finds that the proper remedy for those Plaintiffs that contracted with Defendant after August 7, 1997 and whose deliveries were untimely are not entitled to any remedy. Those Plaintiffs that suffered late delivery between the period of July 31, 1997 and August 7, 1997 are entitled a full refund.

II. Background

A. Procedural History

On June 25, 1999, Defendant timely removed this action from San Diego Superior Court pursuant to 28 U.S.C. § 1441. Subsequently, on June 30, 1999, Defendant filed its answer to Plaintiffs' complaint. On November 10, 1999, Plaintiffs filed a motion for class certification that is currently set to be heard in this Court on June 19, 2000. On November 24, 1999, Plaintiffs filed a first amended class action complaint. On that same day, Defendant filed its answer to the first amended class action complaint.

Then on December 23, 1999, Defendant filed a motion for summary judgment. Before filing its opposition, Plaintiffs filed a cross motion for summary adjudication on January 21, 2000.[1] Both Plaintiffs and Defendant filed their respective oppositions to these motions on March 6, 2000. On March 13,

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[1] Plaintiffs' motion for summary adjudication seeks adjudication of the first cause of action only and only as to liability.

2000, both Plaintiffs and Defendant filed their respective reply papers. On March 16, 2000, Defendant filed an objection to Plaintiffs' reply for exceeding the 10 page limitation pursuant to Local Rule 7. 1(h). Without instruction from the Court, Plaintiffs then filed on March 31, 2000, an amended reply in compliance with Local Rule 7.1(h). As such, the Court disregards Plaintiffs' previous reply and looks to the amended reply.

B. Factual Background

Defendant is federally certified by the Federal Aviation Administration as an all-cargo air carrier. (Def.'s Reply to Opp. Stmt. of Facts ¶ 1.) From July 31, 1997 to August 25, 1997, employees of United Parcel Service ("UPS"), one of Defendant's main competitors, went on strike. (Id. at ¶ 48.) As a result of the UPS strike, Defendant's shipping volume significantly increased and Defendant experienced an increase in revenue. (Id.)

Throughout this period of time, Plaintiff Carey Bros., Inc. sent one shipment for delivery through Defendant's services while Plaintiff On The House Syndication, Inc. sent 43 shipments through Defendant's services. (Id. at ¶ 2.) Each of these shipments were sent under a FedEx USA Airbill ("Airbill"). (Id. at ¶ 3, 4.) The Airbill incorporated by reference the then applicable July 1, 1997 FedEx Service Guide and its amendments and constituted the contract between Plaintiffs and Defendant. (Id.; Def. Lodgment of Exhibits No. 4 Airbill.)

The customer's ("sender") copy of the Airbill stated that Defendant will not be liable "for loss, damage, or delay caused by events [Defendant] cannot control, including but not limited to acts of God, perils of the air, weather

conditions, acts of public enemies, war, strike, civil commotions, or acts of public authorities with actual or apparent authority." (Id. at ¶ 5; Def. Lodgement of Ex. No. 4 Airbill) (emphasis added.) Additionally, the Service Guide provided that "... in no event will [Defendant] be liable for any such ... delay... caused by... [N]ational or local disruptions in air or ground transportation networks due to events beyond [Defendant's] control, such as weather phenomena, strikes, or natural disasters ..." (Id. at ¶ 6; Def. Lodgement of Ex. No. 5 Service Guide, 90) (emphasis added.) In the event of a conflict between the Airbill and the Service Guide, the Service Guide controls. (Id. at ¶ 5; Def. Lodgment of Ex. Nos. 4, 5 Airbill, Service Guide, 81.)

Defendant provided a money-back guarantee policy for service failures not barred by the disclaimers previously mentioned pursuant to its Service Guide. (Def. Stmt. of Facts at ¶ 10; Def. Lodgement of Ex. Nos. 4, 5 Airbill, Service Guide, 91) ("We offer ... Money-Back Guarantees for [service failures]... At our option, we will either refund or credit your transportation charges upon request if we deliver your shipment 60 seconds or more after our published delivery commitment.") For a customer who wishes to seek a refund or credit due to some type of service failure, the Service Guide provides various time frames, depending on the situation, to file a claim with Defendant. (Def.'s Reply to Opp. Stmt. of Facts at ¶¶ 10-12 Def. Lodgment of Ex. No. 5 Service Guide, 85.) In this case, Plaintiffs never filed an internal claim with Defendant as required by the contract.[2]

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[2] Defendant's primary arguments against Plaintiffs rest on the merits and not that Plaintiffs are time barred; specifically, that Plaintiffs did not have any remedy at all because of the suspension of the money-back guarantee and the disclaimer bar to Defendant's liability. This suggests that if Plaintiffs had pursued an internal

(Id. at ¶ 11, 13.)

On July 31, 1997, Defendant issued a press release purporting to suspend its money-back guarantee policy effective immediately, and for the period of the UPS strike. (Def. Lodgment of Ex. No. 6 Press Release.) On August 8, 1997, Defendant issued an amendment to the Service Guide which provided that the money-back guarantee policy has been suspended until further notice and asserted that the suspension be effective as of July 31, 1997. (Def. Lodgment of Ex. No. 7 Amendment.)

During The UPS strike time period of July 31, 1997 to August 25, 1997, Plaintiffs were victims of deliveries beyond the specified time. (Def.'s Reply to Opp. Stmt. of Facts at ¶ 28.) Plaintiffs allege on behalf of themselves and others who suffered late deliveries (See id. at ¶¶ 46, 47), breach of contract, and they seek restitution for unjust enrichment.

II. Analysis

A. Standard of Law

Fed. R. Civ. P. 56(c) authorizes the granting of summary judgment "if the pleadings depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment

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claim with Defendants, it would have been futile. Therefore, the Court agrees with Plaintiffs that the doctrine of futility applies and Plaintiffs were not required to exhaust their internal contractual remedies with Defendant as provided by the contract. See Glover v. St. Louis S.F.R Co, 393 U.S. 324, 331 (1969)

as a matter of law." The standard for granting a motion for summary judgment is essentially the same as for the granting of a directed verdict. Judgment must be entered "if, under the governing law, there can be but one reasonable conclusion as to the verdict . . . . If reasonable minds could differ," judgment should not be entered in favor of the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-51 (1986).

B. The Contract Between Plaintiffs and Defendant

Breach of contract cannot be alleged unless a contract existed between the parties to the action. Here, Plaintiffs and Defendant agree that both the Airbill and Service Guide constituted the governing contract between them. (See Def.'s Reply to Opp. Stmt. of Facts at ¶ 4.) During the period of the UPS strike from July 31, 1997 to August 25, 1997, Defendant made 11,169,726 late deliveries. (Id. at¶¶ 46, 47.) In all these instances, "time was of the essence" because the terms of the contract specified the deadline by which Defendant had to deliver a package. (Id. at ¶ 16.) As a result, Defendant breached its contract with its customers regarding the late deliveries unless some other provision of the contract excuses performance of the promise. See Hoon v. Harmer Steel Products and Supply Co., 278 F.2d 427, 434 (9th Cir. 1960) (finding that a contract which specifies that "time is of the essence" must be performed within the specified time or a breach is found to occur.)

C. Airline Deregulation Act ("ADA") Preemption

Congress sought to eliminate a "state's enact[ment] or enforce[ment] [of] any law, rule, regulation, standard, or other provision..." through the enactment of the Airline Deregulation Act ("ADA") American Airlines, Inc. v.

Wolens, 513 U.S. 219, 228 (1995). Nevertheless, the ADA does not preempt "... the application of state contract law to 'routine breach-of-contract claims'..." Read-Rite Corp. v. Burlington Air Express, Ltd., 186 F.3d 1190, 1197 (9th Cir. 1999). In order for a breach of contract action to be "routine," the claim must be narrowly limited to the terms of the agreement itself without inquiring into the external policies or common law rights of a party involved in the agreement. American, 513 U.S. at 222.

From this precedent, Plaintiffs' claim for breach of contract is "routine" and not preempted by federal law. Plaintiffs' primary argument hinges upon the interpretation of "strike" and "national transportation network" within the terms of the contract itself. There is no need to analyze the common law rights and policies to determine whether Plaintiff will be successful in this action.

D. Merits of Defendant's Motion and Plaintiffs' Cross Motion[3]

Although Defendant concedes that, due to the UPS strike, numerous deliveries were untimely, it relies on the disclaimer

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[3] The Court agrees with Defendant that its disclaimer is legally enforceable because it gave ample notice of its limit on liability and gave Plaintiffs an opportunity to declare higher liability. See Read-Rite Corp, 186 F.3d at 1199, see also Deiro v. American Airlines, Inc, 816 F.2d 1360, 1366 (9th Cir. 1987); Royal Ins. Co v. Sea-Land Service Inc., 50 F.3d 723,727 (9th Cir. 1995); Wagman v. Federal Express Corp, 844 F.Supp. 247, 250-251 (D Md 1994). (See also Def. Lodgment of Ex. Nos. 4, 5 Airbill, Service Guide, 86.) Thus, in order for Plaintiffs to succeed, it must successfully argue that the disclaimers are inapplicable to the case at hand.

to shield it from liability. Plaintiffs, on the other hand dispute the applicability of the disclaimer.

1. There Are No Material Issues of Fact Surrounding the Interpretation of the Disclaimer

The determination of whether an ambiguity exists in the terms of a contract is a question of law. State Farm Mutual Automobile Insurance Co. v. Fernandez, 767 F.2d 1299, 1301 (9th Cir. 1985) citing U S. v. Contra Costa County Water District, 678 F.2d 90, 91 (9th Cir. 1982). After determining that an ambiguity exists, a question of fact exists for a jury. Id. citing Marchese v. Shearson Hayden Stone, Inc., 734 F.2d 414, 417 (9th Cir. 1984). Here, the Court must first determine whether an ambiguity exists in respect to the terms "strike" and "disruption to national transportation" in the agreement. The Court must look at the potential ambiguity in relation to the context of the contract as a whole. See U.S. v. Johnson, 43 F.3d 1308, 1310 (9th Cir. 1994).

In the context of both the Airbill and the Service Guide, this Court finds that the terms "strike" and "national transportation network" have plain meaning. The UPS strike did not rise to a "direct, physical barrier" to Defendant's efficient operation of business such as an airport closure or inclement weather. The term "strike" can mean nothing other than a strike within Defendant's own workforce as an event which would undoubtedly directly and physically affect Defendant's ability to efficiently run its business.

The Court is similarly unable to apply the contract provision "disruption to the national and local transportation network" to the UPS strike. By its plain meaning, transportation network implies a physical link from one

destination to another. In addition, the words "air" and "ground" are used to modify the word "network." They elucidate whether the physical link from one destination to another is by air or by ground. The UPS strike did not disrupt either the local or national transportation network because the strike did not create a physical barrier from one destination to another as an air traffic, pilot, or runway personnel strike might.

For these reasons, there is no ambiguity in the plain meaning of the disclaimer and the disclaimer is inapplicable to the case at hand.

2. The Amendment to the Service Guide Occurred on August 8, 1997, Not July 31, 1997

Even if the disclaimer is inapplicable, Defendant further argues that Plaintiffs are not entitled to any remedy. The money-back guarantee, argues Defendant, was suspended during the time in question barring any contractual remedy by the issuance of its press release on July 31, 1997. Subsequently, Defendant memorialized the suspension by issuing the amendment to the Service Guide on August 8, 1997.

The Court agrees with Plaintiffs' reliance upon Bouton Corp. v. Wrigley Jr. Co., 902 F.2d 1074 (2nd Cir. 1990). There, the Second Circuit held that a mailgram summarizing new terms asserted between the parties of an already existing contract did not constitute a legally binding amendment because the mailgram was not a final and conclusive change to the agreement. Id. at 1076. Similarly, although Defendant argues the press release issued was a final and conclusive change to its Service Guide, the press release was not final and conclusive nor was there any amendment either to the

Airbill contract form or the Service Guide. The press release on July 31, 1997 was nothing more than that, a press release, similar to the mailgram in Bouton Corp. Additionally, the press release did not even purport to constitute an amendment to the contract documents. (See Def. Lodgment of Ex. No. 6 Press Release.) If Defendant wished to make its press release a final and conclusive amended Service Guide amendment, it should have immediately issued the amendment into the Service Guide rather than waiting for over a week.[4]

Defendant's own terms buttress the fact that the contract was not modified on July 31, 1997. In its Service Guide, Defendant reserved the right to unilaterally modify the terms of its contract in writing (Def. Lodgment of Ex. No. 5 Service Guide, 81) (emphasis added.) The issuance of the press release was not a written modification but rather a notification that it would not honor any money-back guarantees during the time in question. The actual written modification to the Service Guide did not occur until August 8, 1997, the date the Service Guide amendment was issued. Given these reasons, the Court finds that the suspension of the money-back guarantee did not occur until August 8, 1997.

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[4] Moreover, it was perfectly reasonable for those customers utilizing Defendant's services between July 31, 1997 and August 7, 1997 to rely upon the express terms of the contract and rely upon the money-back guarantee provision since, during this time, neither the Airbill nor Service Guide made mention of a suspension of the money-back guarantee policy See Ambassador Airways, Inc. v Frank, 124 Cal.App. 56, 63 (1932) ("where there is an express contract, the terms thereof control") Also, neither the Service Guide nor Airbill gave Defendant the authority to give an amendment retroactive effect.

3. Remedy / Restitution

The money-back guarantee was still in effect from the period between July 31, 1997 and August 7, 1997. The proper remedy pursuant to the contract is a full refund for those Plaintiffs[5] who sent a shipment through Defendant between those dates and were untimely delivered.

Those Plaintiffs that contracted with Defendant after August 7, 1997, and whose packages were untimely, are not entitled to any relief at all. Defendant correctly states that the sole remedy provided on the contract was the money-back guarantee. Since the amendment which legally occured on August 8, 1997 unequivocally stated "... until further notice, we will not offer money-back guarantees,"[6] (Def. Lodgment of Ex. No. 7 Amendment) Plaintiffs within this amended time frame are not entitled to any refund.

Additionally, Plaintiffs' claim for restitution under a theory of unjust enrichment during this given time period fails. A claim for "... unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties." Paracor Finance, Inc. v. General Electric Capital Corp., 96 F.3d 1151, 1167 (9th Cir. 1996). Here, the Airbill and Service Guide constituted a binding and enforceable agreement

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[5] Assuming the class is certified.

[6] The Court notes that this particular provision in the amendment gives the erroneous appearance that the pre-amended Service Guide does not provide for money-back guarantees. Nevertheless, Plaintiffs cannot escape the reality that Defendant was clearly asserting that there would be no money-back guarantees during the time frame the amendment would be in effect

between Plaintiffs and Defendant. Since the legally binding August 8, 1997 amendment bars any recovery through the suspension of the money-back guarantee, Plaintiffs during this time frame are not entitled to any remedy at all.

III. Conclusion

For the above mentioned reasons, and pending class certification, the Court ORDERS the following:

(1) Defendant's Motion for Summary Judgment is GRANTED in part and DENIED in part;

(2) Plaintiffs' Cross Motion for Summary Adjudication is GRANTED in part and DENIED in part;

(3) In effect, only those Plaintiffs that suffered late delivery under contracts entered into prior to August 8, 1997 are entitled to a full refund pursuant to the money-back guarantee provided in those contracts.

IT IS SO ORDERED.

DATED: 4-5-00 /s/ _____
UNITED STATES SENIOR DISTRICT JUDGE

cc: All Parties
Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CASE NO. 99CV 1336-B (JFS)

[Filed June 28, 2000]

ON THE HOUSE SYNDICATION, INC., And CAREY BROS., INC., Plaintiffs,	)
v.	)
FEDERAL EXPRESS CORPORATION and DOES 1 - 20, Defendants.	)

ORDER

(1) DENYING DEFENDANT FEDEX'S MOTION FOR RECONSIDERATION
Docket [63-1]

(2) CERTIFYING COURT'S APRIL 6, 2000 ORDER FOR PURPOSES OF INTERLOCUTORY APPEAL
Docket [63-2]

(3) VACATING REMAINING MOTION HEARING DATES

Before this Court is Defendant Federal Express Corporation's ("FexEx") Motion to Alter, Amend, or Reconsider Order under Federal Rule of Civil Procedure 59(e), or in the Alternative, for Certification of Order for Interlocutory Appeal under 28 § 1292(b). Defendant brings this motion in response to this Court's order of April 6, 2000. In that order, this Court granted in part and denied in part Defendant's Motion for Summary Judgment and granted in part and denied in part Plaintiffs On the House Syndication, Inc. and Carey Bros., Inc.'s ("Carey Bros.") (collectively "Plaintiffs") Cross Motion for Summary Adjudication.

For the reasons stated below, this Court DENIES Defendant's Motion to Alter, Amend, or Reconsider this Court's April 6, 2000 Order. This Court further GRANTS FedEx's Motion for Certification of Interlocutory Appeal under § 1292 (b).

I. Denial of Defendant's Motion to Alter, Amend, or Reconsider This Court's April 6, 2000 Order.

A. Standard of Law

The reconsideration of a court order under Federal Rule of Civil Procedure 59(e) (motion to alter or amend judgment) or Federal Rule of Civil Procedure 60(b) (motion for relief from final judgment or order) is appropriate only if the district court: (1) is presentcd with newly discovered evidence; (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law. See School Dist. No. 1J, Multonomah County, Or. V. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993).

B. Discussion

In bringing its motion, FedEx contends that this court committed "clear legal error" and presents the following four arguments. First, FedEx argues that *force majeure* clauses apply to third-party strikes. Second, FedEx argues that the doctrine of futility does not serve to excuse Plaintiffs' failure to comply with the notice conditions of their contracts. Third, FedEx argues that Plaintiffs did not seek summary judgment on Count III of the Amended Complaint. Last, FedEx argues that Plaintiff Carey Bros.' claim is not "viable."

For the reasons stated in its order, this Court finds no merit in any of these contentions. First, this Court disagrees that the *force majeure* clause in this contract applies to the third-party strike of UPS in this case. Second, even though this Court finds that the contract disclaimer is inapplicable in the instant case, FedEx's position has always been that it was shielded from liability by the contract disclaimer. Therefore, Plaintiffs were excused from serving FedEx with notice since serving such notice would have been futile. Third, this Court granted summary adjudication to Plaintiffs with respect to Count I. Count III is redundant as it is subsumed under Count I. Additionally, there were no disputed issues of material fact as to the dates which support Plaintiffs' summary adjudication as to a portion of the time contained within Count I.

Fourth, with respect to FedEx's last argument concerning Plaintiff Carey Bros.' claim, the Court would like to make clear that the April 6, 2000 order does not prevent the dismissal of Carey Bros.' claim nor does it dismiss its claim. The question of whether Carey Bros. is part of the plaintiff class will be determined by the date of Carey Bros.' contract with FedEx and whether that date falls into the relevant cause of action period as set forth in the April 6, 2000 order.

II. Certification of Court's April 6, 2000 Interlocutory Order for Purposes of Appeal under § 1292 (b).

Defendant brings a § 1292 (b) Motion for Interlocutory Appeal. Title 28 § 1292 (b) states in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

Title 28 § 1292 (b).

With respect to this Court's order of April 6, 2000, this Court finds that a controlling question of law exists and that an immediate appeal from the order may materially advance the litigation. Accordingly, this Court finds that certification of its April 6, 2000 order for purposes of interlocutory appeal is appropriate.

Therefore, the Court vacates all motions pending in this Court. The Magistrate Judge's discovery orders, however, will not be affected by this Order and will remain unchanged. If Plaintiff does not have its motion for interlocutory appeal filed within 30 days of this Order, the Court's certification shall be automatically withdrawn and the case will be immediately set for a status hearing within ten days thereafter in order to return the case to the active motion and trial calendar. If Plaintiff timely files its Motion for Interlocutory Appeal, this Court will schedule a status hearing sixty days thereafter.

III. Conclusion

For the above mentioned reasons, the Court DENIES Defendant's Motion to Alter, Amend, or Reconsider this Court's April 6, 2000 order. This Court further GRANTS FedEx's Motion for Certification of Interlocutory Appeal under § 1292 (b) conditional on its being filed within 30 days of the filing of this Order. All other motion hearing dates are vacated. A status hearing will be set per this Order; all counsel will be notified of the date and time.

IT IS SO ORDERED.

DATED: 6-28-00 /s/ _____
UNITED STATES SENIOR DISTRICT JUDGE

cc: All Parties
Magistrate Judge

APPENDIX G

HARRY L. CARTER, ESQ./Bar No. 56309
MICHAEL T. QUINN, ESQ./Bar No. 177899
HIGGS, FLETCHER & MACK LLP
401 West "A" Street, Suite 2600
San Diego, California 92101
(619) 236-1551

Attorneys for Defendant
FEDERAL EXPRESS CORPORATION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ON THE HOUSE SYNDICATION, INC., CAREY BROS., INC., Plaintiffs,	)
v.	)
FEDERAL EXPRESS CORPORATION and DOES 1 - 20, Defendants.	)

NOTICE OF REMOVAL

TO THE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, AND TO PLAINTIFFS BY AND THROUGH PLAINTIFFS' ATTORNEY OR RECORD:

PLEASE TAKE NOTICE that defendant Federal Express Corporation ("FedEx") hereby files its Notice of Removal under 28 U.S.C. § 1441 to effect removal of this civil action which was commenced in the Superior Court of the State of California for the County of San Diego under case number 731137. Removal is proper for the following reasons:

1. On May 26, 1999, plaintiffs filed this action in the Superior Court of the State of California for the County of San Diego.

2. FedEx first received notice of this action on May 28, 1999, when the complaint was served on its registered agent, and thirty days have not yet expired since receipt of said notice.

3. A review of the complaint indicates that this Court has jurisdiction over the subject matter of this civil action pursuant to 28 U.S C. § 1331 because the claim asserted by plaintiff and the liability of FedEx are governed by federal common law, as the complaint involves a shipment in interstate commerce by a federally certificated air carrier. Sam L. Majors Jewelers v. ABX, Inc., 117 F.3d 922 (5th Cir. 1997); McCall-Thomas Eng'g Co. v. Federal Express Corp., 81 F.2d 28, 30 (4th Cir. 1996) ("Claims involving shipments in interstate commerce by air carriers are governed by federal law."); see also Diero v. American Airlines, Inc., 816 F.2d 1360 (9th Cir. 1987); First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc., 731 F.2d 1113 (3d Cir. 1984); North American Phillips Corp. v. Emery Air Freight Corp., 579 F.2d 229 (2d Cir. 1978) (decided under Federal Aviation Act).

4. A copy of all process, pleadings and orders served upon FedEx are attached as Exhibit A.

5. A notice of filing of this notice of removal is being concurrently filed with the Superior Court of the State of California for the County of San Diego and is being concurrently served on plaintiffs by and through plaintiffs' attorney of record.

WHEREFORE, FexEx prays that this civil action be removed to this Court from the Superior Court of the State of California for the County of San Diego.

DATED: 6/25/99 HIGGS, FLETCHER & MACK LLP

By:/s/_____

HARRY L. CARTER
MICHAEL T. QUINN
2600 First National Bank Building
401 West "A" Street
San Diego, CA 92101
Phone: 619-236-1551
Fax: 619-696-1410

Attorneys for Defendant
FEDERAL EXPRESS CORPORATION

APPENDIX H

STATUTORY PROVISIONS INVOLVED

TITLE 49. TRANSPORTATION
SUBTITLE VII. AVIATION PROGRAMS
PART A. AIR COMMERCE AND SAFETY
SUBPART I. GENERAL
CHAPTER 401. GENERAL PROVISIONS

49 USC § 40120

§ 40120. Relationship to other laws

(a) Nonapplication. Except as provided in the International Navigational Rules Act of 1977 (33 U.S.C. 1601 et seq.), the navigation and shipping laws of the United States and the rules for the prevention of collisions do not apply to aircraft or to the navigation of vessels related to those aircraft.

(b) Extending application outside United States. The President may extend (in the way and for periods the President considers necessary) the application of this part [49 USCS § 40101 et seq.] to outside the United States when–

(1) an international arrangement gives the United States Government authority to make the extension; and

(2) the President decides the extension is in the national interest.

(c) Additional remedies. A remedy under this part [49 USCS

§ 40101 et seq.] is in addition to any other remedies provided by law.

UNITED STATES CODE
TITLE 49. TRANSPORTATION
SUBTITLE VII--AVIATION PROGRAMS
PART A--AIR COMMERCE AND SAFETY
SUBPART II--ECONOMIC REGULATION
CHAPTER 417--OPERATIONS OF CARRIERS
SUBCHAPTER I--REQUIREMENTS

49 U.S.C. § 41713

§ 41713. Preemption of authority over prices, routes, and service

(a) Definition.--In this section, "State" means a State, the District of Columbia, and a territory or possession of the United States.

(b) Preemption.--**(1)** Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

(2) Paragraphs (1) and (4) of this subsection do not apply to air transportation provided entirely in Alaska unless the transportation is air transportation (except charter air transportation) provided under a certificate issued under section 41102 of this title.

(3) This subsection does not limit a State, political subdivision of a State, or political authority of at least 2 States that owns

or operates an airport served by an air carrier holding a certificate issued by the Secretary of Transportation from carrying out its proprietary powers and rights.

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.--

(A) General rule.--Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

(B) Matters not covered.--Subparagraph (A)--

(i) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization; and

(ii) does not apply to the transportation of household goods, as defined in section 13102 of this title.

(C) Applicability of paragraph (1).--This paragraph shall not limit the applicability of paragraph (1).

APPENDIX I

PRESS RELEASE APPROVAL FORM

The attached item is submitted for your approval. We respectfully request that you review and return at your earliest opportunity. Thank you.

Please return to: Media Relations/1850Phone:395-3484

Release Date: July 31, 1997

Subject: Statement and Press release on FedEx service adjustments due to UPS issue.

APPROVALS

	Date	Without Changes	With Changes
Shirlee Clark Manager- Media Relations			
Greg Rossiter, Managing Director- PR	7/31		/i/
(Sr. VP of affected organization)			
T. M. Glenn, Sr. V.P. -WW Mkt/Cust Svc.	7/31		/i/

Chris Richards, Managing Director- Legal	7/31		/i/
Scott Hansen, Managing Director - Legal	7/31		/i/
Ken. Masterson, Exec. V.P. - Legal	7/31	/i/	
ABG	7/31	ok	

LEGAL DEPARTMENT ONLY:

Requires FWS Approval _____Yes _____No

Release Approved For Posting to Internet ____Yes ___No

For Information Only

W. R. Margaritis, Corporate Communications
R. M. Halvorson, Investor Relations
R. L. Golightly, Employee Communications

-DRAFT-

Contact: Media Relations (901) 395-3484

FOR IMMEDIATE RELEASE

FEDEX TAKES STEPS TO MAINTAIN RELIABLE SERVICE:
Current customers remain top priority

MEMPHIS, Tenn., July 31, 1997-- Federal Express Corporation today implemented additional measures to maintain the reliability of the company's service during the uncertainty of a potential labor disruption at United Parcel Service. The company has experienced a dramatic increase in volume with customers trying to avoid service disruptions with UPS.

The following temporary measures have been implemented to help FedEx maintain the excellent service its customers have come to expect:

- Current FedEx customers will remain the company's first priority. The company is limiting current customers to their normal shipping volumes to maintain service.

- FedEx will accept packages from customers who bring them to FedEx drop-off locations but the company will limit the quantity of packages it accepts.

- Cut-off times at all drop-off locations are now two hours earlier than usual. We encourage customers to double-check the latest drop-off times where they normally leave their packages for any further changes.

- As provided in our Service Guide and until further notice, we will not offer money-back guarantees.

- FedEx will not open new accounts until the UPS situation is resolved.

- FedEx will continue to make regularly-scheduled stops, but will not schedule any new regular pick-up stops.

Customers may visit our website at http://www.fedex.com for the latest FedEx service updates.

APPENDIX J

Amendment of FedEx Service Guide
Effective July 31, 1997

Amendment to July, 1997
Federal Express Service Guide

In accordance with the provisions of the July, 1997 Federal Express Service Guide and pursuant to my previous written approval, I hereby authorize that the Service Conditions set forth in the Federal Express Service Guide be modified and amended effective July 31, 1997 as follows:

- Current FedEx customers will remain the company's first priority. The company is limiting current customers to their normal shipping volumes to maintain service.

- FedEx will accept packages from customers who bring them to FedEx drop-off locations but the company will limit the quantity of packages it accepts.

- Cut-off times at all drop-off locations are now two hours earlier than usual. We encourage customers to double-check the latest drop-off times where they normally leave their packages for any further changes.

- As provided in our Service Guide and until further notice, we will not offer money-back guarantees.

- FedEx will not open new accounts until the UPS situation is resolved.

- FedEx will continue to make regularly-scheduled stops, but will not schedule any new regular pick-up stops.

Except as expressly modified by this Amendment, the provisions of the July, 1997 Guide and subsequent addendums remain in force and continue to reflect the currently effective conditions applicable to Federal Express service.

/s/_____

T. Michael Glenn
SR. Vice President
Worldwide Marketing,
Customer Service and
Corporate Communications

Dated: August 8, 1997

APPENDIX K

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of Court
(202) 479-3011

December 23, 2003

Mr. David B. Zlotnick
1010 Second Avenue
Suite 1750
San Diego, CA 92101

Re: On The House Syndications, Inc., et al.
v. Federal Express Corporation
Application No. 03A518

Dear Mr. Zlotnick:

The application for an extension of time within which to file a petition for writ of certiorari in the above-entitled case has been presented to Justice O'Connor, who on December 23, 2003 extended the time to and including January 28, 2004.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By /s/_____
Ruth Jones
Case Analyst